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Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

The State of Idaho, *Petitioner*

v.

Laura Lee Wright, *Respondent*

**On Writ of Certiorari to
The Supreme Court of Idaho**

**Brief Of Amicus Curiae
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And Other Amici Listed Inside Cover*
In Support Of Petitioner**

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QUESTION PRESENTED FOR REVIEW

Whether the "indicia of reliability" and "particularized guarantees of trustworthiness" mandated by the Sixth Amendment Confrontation clause of the United States Constitution require that the hearsay statement of a very young victim of sexual abuse to an examining pediatrician be excluded unless the prosecution establishes that (a) the interview was either audio or video-taped; (b) leading questions were not used; and (3) the examining pediatrician conducting the interview did not have any preconceived idea of what the child should be disclosing.

(i)

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INTERESTS OF AMICI

Amici curiae are States, each of which recognizes the important public policy interests served by prosecuting those who sexually abuse children. The States have a compelling interest, as well, in protecting child witnesses. Thirty States have reflected that interest, either by enacting statutes specifically designed to admit the hearsay declarations of certain child victims, or by allowing such testimony, through the use of other hearsay exceptions established by rule or by case law. (See Appendix where the state statutes and rules are set forth at length). By these solutions, the States have attained the delicate constitutional balance necessary to achieve justice for both the child victims and the defendants in these prosecutions.

The decision of the Supreme Court of Idaho requires the taping of child victim interviews, forbids the use of leading questions, and denies the interviewer access to background information which might disclose the abuse. These requirements, if affirmed by this Court, would invalidate the States' varied responses to this difficult issue, for none of their responses meet the Idaho court's restrictive criteria. The amici States accordingly support Idaho in urging reversal of the Idaho Supreme Court.

SUMMARY OF ARGUMENT

The Sixth Amendment's Confrontation Clause, applicable to the States by the Fourteenth Amendment, does not prohibit the use at a criminal trial of all hearsay statements. Consideration of public policy and the necessities of certain criminal prosecutions sometimes require the introduction of these statements.

The States have strong public policies in successfully prosecuting sexual abusers of children and in protecting the child victims of these abusers. Without rules allowing for the admission at trial of the out-of-court statements of these child victims, these strong public policies will be defeated.

In balancing an accused's Confrontation Clause rights against the States'

interests in child molestation cases, the accused's rights must yield where the hearsay statements of child sexual abuse victims possess particularized guarantees of trustworthiness. Such guarantees are sufficient to protect the rights of the accused.

Thirty States have adopted rules allowing for the use of out-of-court statements by child sex abuse victims where the trial judge, after hearing, determines that the statements are trustworthy or reliable. These rules satisfy the requirements of this Court needed to overcome a Confrontation Clause hearsay challenge. To abrogate these rules, or to make them so restrictive as to make them useless as did the court below, will defeat the States' strong interests in this area. Hearsay statements of child sexual abuse

victims, necessary to the successful prosecution of sexual abusers of children, do not run afoul of the Confrontation Clause when they possess particularized guarantees of trustworthiness as required by the rules of the several States. This Court should so hold.

ARGUMENT

The Confrontation Clause Does Not Prohibit The Introduction Of Hearsay Statements Of Child Sexual Abuse Victims Where The Statements Possess Guarantees of Trustworthiness.

In this case the Court must again consider "the relationship between the Confrontation Clause and the hearsay rule with its many exceptions." Ohio v. Roberts, 448 U.S. 56, 62 (1980). Though "[t]he Court in Roberts remained '[c]onvinced that "no rule will perfectly resolve all possible problems"' and rejected the 'invitation to overrule a near-century of jurisprudence' in order to create such a rule, 448 U.S. at 68, n.9," United States v. Inadi, 475 U.S. 387, 392 (1986), it is Roberts which provides the analytical framework for resolution of the instant case.

The Roberts Court, after rejecting a literal reading of the Confrontation

Clause which "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme," conceded "that the clause was intended to exclude some hearsay." Roberts, supra, 448 U.S., at 63. The Court recognized, however, that competing interests--"considerations of public policy and the necessities of the case"--sometimes warranted dispensing with confrontation at trial. Id., at 64. The "interests" identified by the Court in Roberts were each state's "strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." Id. In resolving the several cases which called into question "the relationship between the confrontation clause and the hearsay rule"

the Court "has sought to accommodate these competing interests." Id., at 64. See also Coy v. Iowa, 487 U.S. ___, ___, 108 S.Ct. 2798, 2803 (1988). The process of deciding these cases "has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions." Roberts, supra, 448 U.S., at 64.

In the case sub judice the Court must consider the relationship between the Confrontation Clause and an exception to the hearsay rule permitting admission of out-of-court statements of child sexual abuse complainants. Building on past decisions, drawing on new experience, and responding to changing conditions, the Court should hold that such a rule withstands a Confrontation Clause challenge.

In recent years, the sexual abuse of children has become a serious national problem. See Coy v. Iowa, 487 U.S., at ___, 108 S.Ct., at 2803-2804 (O'Connor, J., concurring). The States have responded resoundingly to this problem. In order to forward their strong interests in enforcing the laws against child sexual abusers and in developing the rules of evidence applicable in criminal proceedings, thirty States have adopted rules of evidence allowing for the admission of the out-of-court statements of these child victims provided they possess the "particularized guarantees of trustworthiness," Ohio v. Roberts, 448 U.S., at 66, needed to satisfy the Confrontation Clause. While the rules vary somewhat they uniformly require findings that the statements have "indicia of

reliability" or are trustworthy before they may be admitted. See, e.g., 42 Pa. Cons. Stat. Ann. § 5985.1 (1990 Pa. Legis. Serv. Act 100 (Purdon)). See also Coy v. Iowa, 487 U.S., at ___, 108 S.Ct., at 2805 (O'Connor, J., concurring) ("if a court makes a case specific finding of necessity, as is required by a number of state statutes.

. . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest in protecting child witnesses.") These rules have been implemented by legislation,¹ evi-

¹Alaska Code of Criminal Procedure § 12.40.110 (1985); 13 Ariz. Rev. Stat. Ann. § 1416 (Supp. 1987); Col. Rev. Stat. § 13-25-129 (1987); Fla. Stat. § 90.803(23) (Supp. 1988); Ga. Code Ann. § 24-3-16; Idaho Code 19-3024 (1987); Ill. (footnote continued on next page)

dentiary rules,² or by case law.³

¹(continued) Ann. Stat. ch. 38, para. 115-10 (Smith-Hurd 1988 Supp); Ind. Code 35-37-4-6 (1988); Kan Stat. Ann. § 60-460 (dd) (1983); Ky. Rev. Stat. Ann. § 421.355 (1986) (declared unconstitutional on state law grounds *Drumm v. Commonwealth*, No. 87-8C-848 MR (Ky filed Jan 18, 1990) (1990 Ky. Lexis 3); Me Rev. Stat Ann. tit 15, § 1205 (1988 Supp.); Md. Cts. Jud. Proc. Code Ann. § 9-103.1 (1988 Supp.); Minn Stat. Ann. § 595.02(3) (West 1988); Mo. Rev. Stat. § 491.075 (1988); Nev. Rev. Stat. Ann. § 51.385 (1986, Supp. 1988); Okla. Stat. Ann. tit. 12, § 2803.1 (West Supp. 1987); Or. Rev. Stat. § 40.460 (1989); 42 Pa.Cons.Stat.Ann. § 5985.1 (1990 Pa. Legis. Serv. Act 100 (Purdon)); S.D. Codified Laws Ann. § 19-16-38 (1987); Tex Code Crim.Proc.Ann. art. 38.072 (Vernon 1985); Utah Code Ann. § 76-5-411(1) (1985); Wash. Rev. Code § 9A.44.120 (1988). These rules are set forth at length in the Appendix.

²Ark. R. Evid. 803 (25)(a); Cal. Evid. Code S 1228 (West 1985); 67 (footnote continued on next page)

³Courts have allowed out-of-court declarations of child victims under (footnote continued on next page)

The States have recognized the oftentimes impossible task of bringing

²(continued) Michigan Bar J. 68 (July 1988) (proposed); Miss. R. 803(25) (proposed); N.J. Evid. R. 63 (33); N.D.R. 803 (24) (eff. 3/1/90); Vt. R.E. 804(9) (Supp. 1988). These statutes are set forth at length in the Appendix.

³(continued) firmly rooted exceptions to the hearsay rule. The Supreme Court of Idaho recognized the admissibility of such declarations when they are "excited utterances" or part of the res gestae. See State v. Wright, 116 Idaho 382, ___, 775 P.2d 1224, 1230-1231 (1989) cert. granted sub nom. Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 833 (1990) (collecting cases). Courts have also admitted such statements when made for the purposes of medical diagnosis or treatment under state rules similar to Fed. R. Evid. 803(4). See e.g., State v. Robinson, 153 Ariz 191, 735 P.2d 801 (1987); People v. Galloway, 726 P.2d 249 (Colo. App. 1986); Drumm v. Commonwealth, No. 87-86-848 MR (Ky. filed Jan. 18, 1990) (1990 Ky Lexis 3); State v. Olesen, 443 N.W. 2d 8 (S.D. 1989); State v. Nelson, 138 Wis.2d 418, 406 N.W. 2d 385 (1987); Goldade v. State, 674 P.2d 721 (Wyo 1983), cert. denied, sub nom. Goldade v. Wyoming, 467 U.S. 1253 (1984).

Many States now recognize an (footnote continued on next page)

sexual abusers of children to book and have responded by adopting rules of evidence that are necessary to successful prosecution of these cases while, at the same time, fulfilling the requirements of the Confrontation Clause. These rules promote the compelling state interest in the physical and psychological well-being of children which this Court has historically stressed. See New York v. Ferber, 458 U.S. 747 (1982); and Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

³(continued) exception to the hearsay rule patterned after Fed.R.Evid. 803(24), often called the "residual" exception. Child victims hearsay statements have been found admissible under such an exception. See e.g. State v. Robinson, 153 Ariz. 191, 735 P.2d 801 (1987); Oldsen v. People, 732 P.2d 1132 (Colo. 1986); State v. Deanes, 323 N.C. 508, 374 S.E. 2d 249 (1988), cert. denied sub nom. Deanes v. North Carolina, ___ U.S. ___, 109 S.Ct. 2455 (1989).

See also Coy v. Iowa, 487 U.S., at ___, 108 S.Ct., at 2805 (O'Connor, J., concurring) ("The protection of child witnesses is, in my view and in the view of a substantial majority of the States [an important public] policy.").

The strong public policy of effective enforcement of the States' child sexual abuse laws necessitates this exception to the hearsay rule. The child victims of sexual abuse are often unavailable to testify because of their age, or because of the trauma resulting from the very crimes that have been committed upon them. The defendant who picks these vulnerable people as victims should not benefit from his or her misconduct. As the Court of Appeals for the Seventh Circuit observed, "how ironic it would be if the child molester could use the trauma inflicted on his

victim as the fulcrum for leveraging his way to freedom." Nelson v. Farrey, 874 F.2d 1222, 1230 (7th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 835 (1990).

In many child abuse cases, confrontation is impossible due to the actions of the accused, the person asserting the right. Such a defendant should not benefit from abusing a child, just as the law does not allow a defendant to benefit from murdering a witness against him, absenting himself from trial, or engaging in contumacious conduct in a courtroom. Taylor v. United States, 414 U.S. 17 (1973); Illinois v. Allen, 397 U.S. 337 (1970); and United States v. Thevis, 665 F.2d 616 (5th Cir. 1982). Voiding these state rules of evidence will have that effect.

These public policy concerns have been well-stated by the intermediate appellate court of Minnesota in upholding a state statute in the face of a Confrontation Clause challenge. The court said:

The Minnesota legislature has enacted a statute in order to extend the circumstances in which hearsay testimony of child abuse victims is admissible, consistent with the constitutional guarantees incorporated into the statute. The legislature did not want to allow child abusers to escape conviction merely by choosing victims who, due to their age or otherwise, are unavailable to testify at trial.

State v. Bellotti, 383 N.W.2d 308, 316 (Minn. App. 1986).

The States have responded to this problem in a logical and intelligent manner. They have utilized established

legal methods to address the phenomenon of sexual abuse of children by building on past decisions of this Court. The responses have ensured that the hearsay statements of these sexually abused child victims possess the particularized guarantees of trustworthiness which this Court has said are necessary to overcome any Confrontation Clause hearsay challenge. See Coy v. Iowa, 487 U.S., at ___, 108 S.Ct., at 2803. With the exception of the Supreme Court of Idaho,⁴ every court which has addressed such a challenge has rejected it, relying on this Court's opinions in Ohio v. Roberts, supra, and United States v.

⁴State v. Wright, 116 Idaho 383, 775 P.2d 1224 (1989), cert. granted sub nom. Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 833 (1990).

Inadi, supra.⁵ Legislators and judges have recognized the necessity of

⁵See e.g., State v. Robinson, 153 Ariz. 191 735 P.2d 801 (1987), (although the statute was violative of state separation of powers doctrine, it did not violate Confrontation Clause; moreover, the statements were still admissible under other exceptions to hearsay rule); Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (1987) (upholding rule of evidence against Confrontation Clause challenge); People v. Galloway, 726 P.2d 249 (Colo. App. 1986) (upholding statutory hearsay exception against challenge based on Confrontation Clause in case where child victim testified at trial); Perez v. State, 536 So.2d. 206 (Fla. 1988), cert. denied, sub. nom. Perez v. Florida ___ U.S. ___, 109 S.Ct. 3253 (1989) (upholding statutory hearsay exception for certain statements of child victims of sexual abuse where victim was unavailable as a witness and where Confrontation Clause challenge to evidence was made); Sosebee v. State, 257 Ga. 298, 357 S.E.2d 562 (1987) (upholding against Confrontation Clause challenge a statutory hearsay exception which required the victim's availability to testify); People v. Boastick, 140 Ill. App. 3d 78, 94 Ill. Dec. 500, 488 N.E.2d 326 (1986) (upholding statutory exception in factual setting where (footnote continued on next page)

providing answers to the problem of children so traumatized by the criminal act of abuse that they are unable to testify against their abusers. The responses have been constitutional as a review of the state rules and decisions upholding them in the face of Confrontation Clause challenges demonstrates.

⁵(continued) victim testified); State v. Myatt, 237 Kan 17, 697 P.2d 836 (1985) (upholding statutory hearsay exception where victim was disqualified as witness); State v. Bellotti, 383 N.W. 2d 308 (Minn. App. 1986) (same); State v. Wright, 751 S.W. 2d 48 (Mo. 1988) (upholding statute against a Confrontation Clause challenge); Buckley v. State, 758 S.W.2d 339 (Tex. App. Texarkana 1988), petition for discretionary review denied, and Holland v. State, 770 S.W.2d (Tex. App. Austin 1989) petition for discretionary review denied, (same); State v. Nelson, 72 Utah Adv. Rep. 15, 725 P.2d 1353 (1986) (same); State v. Gallagher, 150 Vt. 341, 554 A.2d 221 (1988) (same); State v. John Doe, 105 Wash 2d. 889, 719 P.2d 554 (1986) (same).

Taking its cue from this Court's decision in Ohio v. Roberts, Kansas, for example, adopted a rule of evidence allowing a child crime victim's hearsay statements if "the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises. . ." Kan.Stat.Ann. § 60-460(dd) (1983 Supp. 1988); Appendix pp. 13-14. Rejecting a challenge based upon the Confrontation Clause, the Kansas Supreme Court found the evidentiary rule to fully comply with this Court's dictates in Roberts: a judicial determination of unavailability and particularized guarantees of trustworthiness, required since the statute was not a firmly rooted hearsay

exception. State v. Myatt, 237 Kan. 17, ___, 697 P.2d 836, 843 (1985).

The Court in Myatt reflected upon the necessity of the hearsay statements at trial. The child victim's out-of-court statements often constitute the only proof of the crime of sexual abuse. The offender is usually a relative or close acquaintance who has the opportunity to be alone with victim. Witnesses are rare, as people ordinarily do not molest children in front of others. Corroborating physical evidence may be absent or inconclusive. For many reasons, the child may be unable to testify at trial. Id., at 841.

Of trustworthiness, the Kansas Court stated:

The determination of reliability and trustworthiness must be made on a case-by-case basis. Such

factors as the age of the child; his or her physical and mental condition; the circumstances of the alleged event; the language used by the child; the presence of corroborative physical evidence; the relationship of the accused to the child; the child's family, school, and peer relationships; any motive to falsify or distort the event; and the reliability of the testifying witness can be examined. See, e.g., United States v. Nick, 604 F.2d 1199 (9th Cir. 1979); State v. Rodriguez, 8 Kan. App.2d at 355-57, 657 P.2d 79. Contrary to the defendant's argument, the statute does not allow admission of the hearsay statements of a child victim for the sole reason that the statement was made by a child.

Id. (Emphasis supplied).

While corroborative physical evidence is but one factor in a trustworthiness determination in Kansas, Minnesota requires corroborative evidence where the child is unavailable

to testify. Minn. Stat. Ann. § 595.02(3)(b)(ii); Appendix pp. 20-21. The Minnesota statute withstood a constitutional challenge based upon the Confrontation Clause in State v. Bellotti, 383 N.W.2d 308 (Minn. App. 1986).

There were two child victims in the Bellotti case--one who testified, and one who did not. Both children were females, and each was four years old. The child who testified did so after the court found ten indicia of reliability in a hearing outside the presence of the jury.

As to hearsay statements of T.C. (the child who testified) about assaults on the other child, C.B., the court admitted them under Minn.R.Evid. 803 (24), the residual hearsay exception, applying the same indicia of reliability

used to admit T.C.'s statements about the assault on herself. Because T.C. testified and was available for cross-examination, the court said no confrontation right was implicated, citing California v. Green, 399 U.S. 149, 158 (1970).

As to C.B.'s out-of-court statements, since C.B. did not testify due to a finding of incompetency, and, therefore, unavailability, not only were the indicia of reliability necessary, of which the court found seven, but the necessary independent corroboration was found in T.C.'s direct testimony and defendant's partial confession.

Florida also mandates a showing of "corroborative evidence of the abuse or offense" where the child hearsay declarant is unavailable as a witness. Fla.Stat. § 90.803(23)(9) 2 b (West

Supp. 1989), Appendix pp. 7-8. Upholding the statute, the Florida Supreme Court in Perez v. State, 536 So.2d 206 (1988), cert.denied, sub nom. Perez v. Florida, ___ U.S. ___, 109 S.Ct. 3253 (1989), found the statute:

follows the general approach set forth by the United States Supreme Court in Ohio v. Roberts. . . . [T]he statute provides that before the out-of-court statements of the child victim may be admitted the court must first find, in a hearing, that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." Secondly, the child victim must either testify or be unavailable as a witness. If the child testifies, the defendant has been afforded an opportunity to confront the hearsay declarant. See California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). If the child victim does not testify, section 90.803(23) requires, in addition to a

determination that the child is unavailable, "other corroborative evidence of the abuse or offense," which provides particularized guarantees of trustworthiness.

— Fla. —, —, 536 So.2d 206, 209.

The Florida statute suggests that the court consider "the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate" in determination of the "sufficient safeguards of reliability" to allow the proffered hearsay. Fla. Stat. § 90.803 23(a)(1)(West Supp. 1989). These factors which are not an "exhaustive list of elements to be considered", Perez, supra at 210, must be supplemented by corroborative

evidence where the victim is unavailable.

These States,⁶ along with Pennsylvania, have exercised their power to determine rules of evidence in criminal proceedings. Each permits introduction of hearsay declarations of child sexual abuse victims consistent with the defendant's Confrontation Clause rights as outlined by this Court.

The States have properly considered and resolved this serious national problem. These child hearsay rules

⁶As well as others, see infra n. 1-3. A sample statute of the American Bar Association's National Legal Resource Center for Child Advocacy and Protection has served as the model for legislation in a number of States. The model statute was carefully drafted in accordance with this Court's mandates to afford the perpetrator his or her confrontation rights. "Protecting Child/Victim Witnesses", National Legal Resource Center for Child Advocacy and Protection, February, 1986, pp. 5-9, 82. Appendix, pp. 40-44.

properly balance the need for reliable testimony against the particular problems of the child witness and, by requiring that the out-of-court statements possess particularized guarantees of trustworthiness, satisfy the requirements of the Confrontation Clause. The Idaho Supreme Court applied this Court's prior decisions in too restrictive a fashion without giving due regard to the strong public policies here involved and to the necessities of these cases. Amici respectfully urge this Court to reverse the decision below.

CONCLUSION

For the reasons stated above, amici curiae request that this Honorable Court reverse the judgment of the Supreme Court of Idaho.

Respectfully submitted,

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BY:

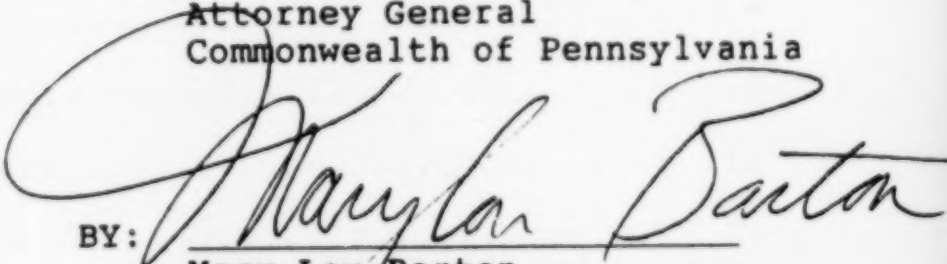

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(ii)

APPENDIX

Alaska - Code of Criminal Procedure
 Sec. 12.40.110 Hearsay evidence in prosecutions for sexual offenses. (a) In a prosecution for an offense under AS 11.41.410--11.41.440 or 11.41.455, hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child who is the victim of the offense may be admitted into evidence before the grand jury if

- (1) the circumstances of the statement indicate its reliability;
- (2) the child is under 10 years of age when the hearsay evidence is sought to be admitted;
- (3) additional evidence is introduced to corroborate the statement; and
- (4) the child testifies at the grand jury proceeding or the child will be available to testify at trial.

(b) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion. (§ 1 ch 41 SLA 1985)

Arizona - Criminal Code Title 13
 § 13-1416. Admissibility of minor's statement; notice

A. Except as otherwise provided in title 8, a statement made by a minor who is under the age of ten years describing any sexual offense or physical abuse performed with, on or witnessed by the minor, which is not otherwise admissible by statute or court rule, is admissible in evidence in any criminal or civil proceeding if both of the following are true:

1. The court finds, in an in camera hearing, that the time, content and circumstances of the statement provide sufficient indicia of reliability.

2. Either of the following is true:

(a) The minor testifies at the proceedings.

(b) The minor is unavailable as a witness, provided that if the minor is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the statement.

B. A statement shall not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

Arkansas - Rules of Evidence

Rule 803. Hearsay exceptions - Availability of declarant immaterial.- The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(25)(A) A statement made by a child under ten (10) years of age concerning any act or offense against the child involving sexual offenses, child abuse or incest is admissible in any criminal proceeding in a court of this State, provided:

1. The Court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:

- a. the age of the child
- b. the maturity of the child
- c. the time of the statement
- d. the content of the statement
- e. the circumstances surrounding the giving of the statement
- f. the nature of the offense involved
- g. the duration of the offense involved
- h. the relationship of the child to the offender
- i. the reliability of the assertion
- j. the reliability-credibility of the child witness before the Judge
- k. the relationship or status of the child to the one offering the statement
- l. any other corroborative evidence of the act which is the subject of the statement.

m. any other fact or which the Court at the time and under the circumstances deems relevant and appropriate.

2. The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

3. If a statement is admitted pursuant to this Section the Court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

4. This Section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable Rule of Evidence.

California - Evidence Code

§ 1228. Statement of minor child as victim of sexual abuse.

Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

(a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.

(b) The statement describes the minor child as a victim of sexual abuse.

(c) The statement was made prior to the defendant's confession. The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice.

(d) There are no circumstances such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable.

(e) The minor child is found to be unavailable pursuant to paragraph (2) or (3) of subdivision (a) of Section 240 or refuses to testify.

(f) The confession was memorialized in a trustworthy fashion by a law enforcement official.

If the prosecution intends to offer a statement of the complaining witness

pursuant to this section, the prosecution shall serve a written notice upon the defendant at least ten days prior to the hearing or trial at which the prosecution intends to offer the statement.

If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

Colorado - Evidence-General Provisions

§ 13025-129. Statements of child victim of unlawful sexual offense against a child or of child abuse - hearsay exception. (1) An out-of-court statement made by a child, as child is defined under the statutes which are the subject of the action, describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, C.R.S. performed with, by, on, or in the presence of the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S. or in which a child is the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104(1)(b), C.R.S., and an out-of-court statement by a child, as child is defined under the statutes which are the subject of the action,

describing any act of child abuse, as defined in section 18-6-401, C.R.S., to which the child declarant was subjected or which the child declarant witnessed, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of child abuse or the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104(1)(b), C.R.S., if:

(a) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards or reliability; and

(b) The child either:

(I) Testifies at the proceedings; or

(II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(2) If a statement is admitted pursuant to this section, the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(3) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

Florida - Evidence Code

§ 90.803. Hearsay exceptions; availability of declarant immaterial

The provision of § 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(23) Hearsay exception; statement of child victim of sexual abuse or sexual offense against a child.-

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with by, or on the declarant child, not otherwise admissible, is admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to § 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Added by laws 1985, c 85-53 § 4, eff. July 1985. Amended by Laws 1987, c. 87-224, § 11.

Georgia - Evidence Code

§ 24-3-16 Testimony as to child's description of sexual contact or physical abuse.

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to

testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability. (Code 1981, § 24-3-16, enacted by Ga. L. 1986. p. 668. § 1.)

Idaho - Rules of Evidence

§ 19-3024. Statements by child

Statements made by a child under the age of ten (10) years describing any act of sexual abuse, physical abuse, or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, Chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

1. The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and

2. The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness. A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Provided, that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.

Statements may not be admitted unless the proponent of the statements, notifies the adverse party of his intention to offer the statements and the particulars of the statements

sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements.

Rule 803, Idaho Rules of Evidence provides:

Rule 803. Hearsay exceptions; availability of declarant immaterial. - The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Illinois - Criminal Law and Procedure

§ 115-10 Sexual acts on child under 13 - Hearsay exception § 115-10. (a) In a prosecution for a sexual act perpetrated upon a child under the age of 13, including but not limited to

prosecutions for violations of sections 12-13 through 12-16 of the Criminal Code of 1961, the following shall be admitted as an exception to the hearsay rule:

(1) testimony by such child of an out of court statement made by such child that he or she complained of such act to another; and

(2) testifies of an out-of-court statement made by such child describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual act perpetrated upon a child.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child either:

(A) Testifies at the proceeding; or

(B) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the

statement.

Indiana - Rules of Procedure

§ 35-37-4-6 Application of section; admissibility of statement or videotape made by children; notice to defendant of hearing; corroborative evidence: prosecuting attorney's duties

Sec. 6. (a) This section applies to criminal actions for the following:

- (1) Child molesting (IC 35-42-4-3).
- (2) Battery upon a child (IC 35-42-2-1(2)(B)).
- (3) Kidnapping (IC 35-42-3-2)
- (4) Confinement (IC 35-42-3-3).
- (5) Rape (IC 35-42-4-1).
- (6) Criminal deviate conduct (IC 35-42-4-2).

(b) A statement or videotape that:

(1) is made by a child who was under ten (10) years of age at the time of the statement or videotape;

(2) concerns an act that is material element of an offense listed in subsection (a) that was allegedly committed against the child; and

(3) is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in a criminal action for an offense listed in subsection (a) if the requirements of subsection (c) are met.

(c) A statement or videotape described in subsection (b) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:

(1) the court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the child; that the time, content, and

circumstances of the statement or videotape provide sufficient indications of reliability; and

(2) the child:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness because:

(i) a psychiatrist has certified that the child's participation in the trial would be a traumatic experience for the child;

(ii) a physician has certified that the child cannot participate in the trial for medical reasons; or

(iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

(d) If a child is unavailable to testify at the trial for a reason listed in subsection (c)(2)(B), a statement or videotape may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child.

(e) A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney of:

(1) his intention to introduce the statement or videotape in evidence; and

(2) the content of the statement or videotape;

within a time that will give the defendant a fair opportunity to prepare a response to the statement or videotape before the trial.

Kansas - Rules of Evidence

§ 60-460. Hearsay evidence excluded, exceptions. Evidence of a statement

which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(dd) In a criminal proceeding or in a proceeding to determine if a child is a deprived child under the Kansas juvenile code or a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that the child is a deprived child or a child in need of care, if:

(1) The child is alleged to be a victim of the crime, a deprived child or a child in need of care; and

(2) the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

Kentucky - Revised Statutes

§ 421.355 Admissibility of victim's out-of-court statements

(1) Notwithstanding any other

provision of law or rule of evidence, a child victim's out-of-court statements regarding physical or sexual abuse, or neglect of the child are admissible in any criminal or civil proceeding, including a proceeding to determine the dependency of the child, if, prior to admitting such a statement, the court determines that:

(a) The general purpose of the evidence is such that the interest of justice will best be served by admission of the statement into evidence; and

(b) The statements are determined by the court to be reliable based upon the court's consideration of: the age and maturity of the child, the nature and duration of the abuse, the emotional or psychological effects of said abuse or neglect upon the child, the relationship of the child to the offender, the reliability of the child witness, and the circumstances surrounding the statement.

Maine - Title 15. Revised Statutes Annotated

§ 1205. Certain out-of-court statements made by minors describing sexual contact

A hearsay statement made by a person under the age of 16 years, describing any incident involving a sexual act or sexual contact performed with or on the minor by another, shall not be excluded as evidence in criminal proceedings in courts of this State if:

1. Mental or physical well-being of a person. On motion of the attorney for the State and at an in camera hearing, the court finds that the mental or physical well-being of that person will more likely than not be harmed if that person were to testify in open court; and

2. Examination and cross-examination. Pursuant to order of court made on such a motion, the statement is made under oath, subject to all of the rights of confrontation secured to an accused by the Constitution of Maine or the United States Constitution and the statement has been recorded by any means approved by the court, and is made in the presence of a judge or justice.

Maryland - Annotated Code of Maryland § 9-103.1. Out of court statements of child abuse victims.

(a) "Statement" defined. - In this section "statement" means:

- (1) An oral or written assertion; or
- (2) Nonverbal conduct, if it is intended as an assertion, including sounds, gestures, demonstrations, drawings, or similar actions.

(b) Admissibility - In general. -

(1) Subject to the provisions of paragraphs (2) and (3) of this subsection, if a court finds that the requirements of subsection (c) of this section are satisfied, a court may admit into evidence in a criminal proceeding an out of court statement, to prove the truth of the matter asserted in the statement, made by a child victim under the age of 12 years, who is the alleged victim in the case before the court, concerning an alleged offense against the child of child abuse, as defined under Article 27, § 35A of the Code.

(2)(i) An out of court statement may be admissible under this section only if the statement was made to and is offered by:

1. A licensed physician, as defined under § 14-101 of the Health Occupations Article;
2. A licensed psychologist, as

defined under § 16-101 of the Health Occupations Article;

3. A licensed social worker, as defined under § 18-101 of the Health Occupations Article; or

4. A teacher; and

(ii) The individual described under item (i) of this paragraph was acting in the course of the individual's profession when the statement was made.

(3) An out of court statement may be admissible under this section only if the statement possesses particularized guarantees of trustworthiness.

(c) Same - Conditions precedent. -

(1) An out of court statement by a child may come into evidence to prove the truth of the matter asserted in the statement if the child is subject to cross-examination about the out of court statement and testifies:

(i) At the criminal proceeding; or

(ii) By closed circuit television

(2) An out of court statement by a child may come into evidence to prove the truth of the matter asserted in the statement if:

(i) The child is unavailable to testify at the criminal proceeding due to the child's:

1. Death;

2. Absence from the jurisdiction, for good cause shown, and the State has been unable to procure the child's presence by subpoena or other reasonable means;

3. Serious physical disability; or

4. Inability to communicate about the alleged offense due to serious emotional distress;

(ii) The child's statement is not admissible under any other hearsay

exception; and

(iii) There is a corroborative evidence.

(3) In order to provide the defendant with an opportunity to prepare a response to the statement, the prosecutor shall give to the defendant and the defendant's attorney, at least 20 days before the criminal proceeding in which the statement is to be offered into evidence, notice of:

(i) The prosecution's intention to introduce the statement; and

(ii) The content of the statement.

(4)(i) The defendant shall have the right to take the deposition of a witness who will testify under this section;

(ii) Unless the State and the defendant agree, or the court orders otherwise, the defendant shall file a notice of deposition at least 5 days before the date of the deposition; and

(iii) Except where inconsistent with this paragraph, the provisions of Maryland Rule 4-261 shall apply to a deposition taken under this paragraph.

(d) Particularized guarantees of trustworthiness. - In order to determine if a child's statement possesses particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:

(1) The child's personal knowledge of the event;

(2) The certainty that the statement was made,

(3) Any apparent motive to fabricate or exhibit partiality by the child, including interest, bias, corruption, or coercion;

(4) Whether the statement was

spontaneous or directly responsive to questions;

(5) The timing of the statement;

(6) Whether the child's young age makes it unlikely that the child fabricated the statement that represents a graphic, detailed account beyond the child's knowledge and experience and the appropriateness of the terminology to the child's age;

(7) The nature and duration of the abuse;

(8) The inner consistency and coherence of the statement;

(9) Whether the child was suffering pain or distress when making the statement;

(10) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;

(11) Whether the statement is suggestive due to the use of leading questions; and

(12) The credibility of the person testifying about the statement.

(e) Role of court. - The court, in determining whether a statement is admissible under this section, in a hearing outside the presence of a jury, shall:

(1) Make a finding on the record as to the specific guarantees of trustworthiness that are present in the statement; and

(2) Determine the admissibility of the statement.

(f) Construction of section - This section may not be construed to limit the admissibility of a statement under any other applicable hearsay exception or rule of evidence. (1988, chs. 548, 549.)

Minnesota - Chapter 595. Witnesses

§ 595.02

Subd. 3. Certain out-of-court statements admissible. An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child or person mentally impaired as defined in section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or
(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

For purposes of this subdivision, an out-of-court statement includes video,

audio, or other recorded statements. An unavailable witness includes an incompetent witness.

Mississippi - Mississippi Code Volume 4

§ 13-401. Applicability of special evidentiary provisions.

The rules of evidence prescribed in Sections 13-1-401 through 13-1-415 shall be applicable in any youth court proceeding and in any criminal prosecution under the following sections of the Mississippi Code of 1972:

(a) Section 97-5-21, Mississippi Code of 1972, relating to seduction of a child under age eighteen (18);

(b) Section 97-5-23, Mississippi Code of 1972, relating to the touching of a child for lustful purposes;

(c) Section 97-5-23, Mississippi Code of 1972, relating to the exploitation of children;

(d) Section 97-5-39, Mississippi Code of 1972, relating to contributing to the neglect or delinquency of a child and felonious battery of a child;

(e) Section 97-5-41 Mississippi Code of 1972, relating to the carnal knowledge of a stepchild, adopted child or child of a cohabitating partner;

(f) Section 97-3-95, Mississippi Code of 1972, relating to sexual battery; or

(g) Section 97-29-59, Mississippi Code of 1972, relating to unnatural intercourse.

SOURCES: Laws, 1986, ch 345 § 1, eff from and after July 1, 1986.

§ 13-1-403. Admissibility of child's out-of-court statements.

(1) An out-of-court statement made by a child under the age of twelve (12)

describing any act of child abuse, sexual abuse or any other offense involving an unlawful sexual act, contact, intrusion or penetration performed in the presence of, with, by or on the declarant child, not otherwise admissible, is admissible in evidence to prove the contents thereof, if:

(a) Such statement is made for the purpose of receiving assistance or advice in order to prevent or mitigate the recurrence of the offenses, or in order to obtain advice about the psychological, social or familial consequences associated with the offenses; and

(b) Such statement is made to a person on whom the child should reasonably be able to rely for assistance, counseling or advice; and

(c) The child either:

(i) Is available to testify; or

(ii) Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. A finding of unavailability, except in those situations specified by Rule 804 of the Mississippi Rules of Evidence shall require a finding by the court, based on the specific behavioral indicators described in § 13-1-411, that the child's participation in the trial would result in a substantial likelihood of traumatic emotional or mental distress; and

(d) The court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient guarantees of trustworthiness. In determining the trustworthiness of the statement, the court may consider the age and maturity

of the child, the nature and duration of the abuse or offense alleged, factors which may detract from the declarant's credibility, information provided about the child's reliability based on the specific behavioral indicators described in § 13-1-411, or any other factor deemed appropriate.

(2) The defendant shall be notified no later than ten (10) days before trial that an out-of-court statement as described in this section shall be offered in evidence at trial. The notice shall include a written statement of the content of the child's statement, the time the statement was made, the circumstances surrounding the statement which indicate its reliability and such other particulars as necessary to provide full disclosure of the statement.

(3) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

Mississippi - Proposed Rule of Evidence Rule 803(25)

(25) Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Comment

Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements, (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. A finding that there is a sufficient indicia of reliability should be made on the record.

Mississippi's pre-rule tender years exception did not define "tender years". See *Williams v. State*, 427 So.2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration need not be eyewitness testimony or physical evidence, but may

include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

Missouri - Revised Statutes of the State of Missouri

Chapter 491 § 491.075 R.S.Mo. (1988)

491.075 Statement of child under twelve admissible, when

1. A statement made by a child under the age of twelve relating to an offense under Chapter 565, 566 or 568, R.S.Mo., performed with or on a child by another, not otherwise admissible by a statute or court rule is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

- (a) Testifies at the proceedings; or
- (b) Is unavailable as a witness.

2. Notwithstanding subsection 1 of this section or any provision of law or rule of evidence requiring corroboration of statements, admissions or confessions of the defendant, and notwithstanding any prohibition of hearsay evidence, a statement by a child when under the age of twelve who is alleged to be a victim of an offense under chapter 565, 566 or 568, R.S.Mo., is sufficient corroboration of a statement, admission or confession regardless of whether or not the child is available to testify regarding the offense.

3. A statement may not be admitted under this section unless the

prosecuting attorney makes known to the accused or his counsel his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the accused or his counsel with a fair opportunity to prepare to meet the statement.

4. Nothing in this section shall be construed to limit the admissibility of statements, admissions or confessions otherwise admissible by law.

History. L. 1985 H.B. 366, et. al.

Effective 7-19-85

Nevada Rev. Stat. Ann. Chapter 51

§ 51.385. Admissibility; notice of unavailability of child to testify.

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child is admissible in a criminal proceeding regarding that sexual conduct if the:

(a)

Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b)

Child either testifies at the proceeding or is unavailable or unable to testify.

2. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the

prosecution's intention to offer the statement in evidence. (1985, p. 2132.)

New Jersey Senate Joint Resolution No. 56

Rule 63. Hearsay evidence excluded; exceptions.

Evidence of a statement offered to prove the truth of the matter stated which is made other than by a witness while testifying at the hearing is hearsay evidence and is inadmissible except as provided in Rules 63 (1) through [63 (32)] 63 (33).

A new rule designated as Rule 63 is adopted to read as follows:

Rule 63 (33). Statements by a child relating to a sexual offense.

A statement a child under the age of 12 relating to a sexual offense under the Code of Criminal Justice committed on, with, or against that child is admissible in a criminal proceeding brought against a defendant for the commission of such offense if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 8 (1), that on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to

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this rule shall be disqualified to be a witness in such proceeding by virtue or the requirements of paragraph (b) of Rule 17.

North Dakota Rule of Evidence
Rule 803(24)

(24) Child's Statement About Sexual Abuse. An out-of-court statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child is admissible as evidence (when not otherwise admissible under another hearsay exception) if:

(a) The trial court finds, after hearing upon notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and

(b) The child either:

(i) Testifies at the proceedings; or

(ii) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement

Oklahoma - Evidence Code

§ 2803.1. Statements of children 12 years of age or younger describing acts of sexual contact--Admissibility in criminal and juvenile proceedings.

A. A statement made by a child twelve (12) years of age or younger which describes any act of sexual contact performed with or on the child by another, is admissible in criminal and juvenile proceedings in the courts in this state if:

1. The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

2. The child either:

a. testifies at the proceedings, or

b. is unavailable as defined in Title 12 as a witness.

When the child is unavailable as defined in Title 12 as a witness, such statement may be admitted only if there is corroborative evidence of the fact.

B. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at least ten (10) days in advance of the proceedings to provide the adverse party with an opportunity to prepare to answer the statement.

Oregon Rev. Stat.

§ 40.460 (1989)

40.460 Rule 803. Hearsay exception; availability of declarant immaterial. The following are not excluded by ORS 40.455, even though the declarant is available as a witness:

(18a)(a) A complaint of sexual misconduct made by the prosecuting witness after the commission of the alleged offense. Except as provided in paragraph (b) of this subsection, such evidence must be confined to the fact that the complaint was made.

(b) A statement made by a child victim who is under 10 years of age, which statement describes an act of sexual conduct performed with or on the child by another, is not excluded by ORS 40.455 if the statement is offered as

evidence in the criminal trial or juvenile court proceeding and if the child either testifies at the proceeding and is subject to cross-examination or is unavailable as a witness and if the proponent of admissibility establishes to the satisfaction of the court outside the presence of the jury, if any, that the time, content and circumstances of the statement provide substantial indicia of reliability. However, when the child is unavailable as a witness, the statement may be admitted in evidence only if there is corroborative evidence of the act of sexual conduct and of the defendant's participation in the conduct. No statement may be admitted under this paragraph except upon motion of the state and unless the proponent of the statement makes known to the adverse party the proponent's intention to offer the statement and the particulars of the statement no later than 15 days before trial, except for good cause shown. For purposes of this paragraph, in addition to those situations described in ORS 40.465 (1), the child shall be considered "unavailable" if the child has a substantial lack of memory of the subject matter of the statement, is presently incompetent to testify, is unable to communicate about the offense because of fear or other similar reason or is substantially likely, as established by expert testimony, to suffer lasting severe emotional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the child in chambers and on the record or outside the presence of the jury and on the record. The examination shall be conducted in the presence of

the attorneys and the child's parent, legal guardian or other suitable adult as designated by the court. The purpose of the examination shall be to aid the court in making its findings regarding the child's availability as a witness and the reliability of the child's statement. In determining whether a statement possesses substantial indicia of reliability under this paragraph, the court may consider, but is not limited to, the following factors:

(A) The child's personal knowledge of the event;

(B) The age and maturity of the child;

(C) Certainty that the statement was made, including the credibility of the person testifying about the statement and any motive the person may have to falsify or distort the statement;

(D) Any apparent motive the child may have to falsify or distort the event, including the statement;

(E) The timing of the child's statement;

(F) Whether more than one person heard the statement;

(G) Whether the child was suffering pain or distress when making the statement;

(H) The nature and duration of any alleged abuse;

(I) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(J) Whether the statement has internal consistency or coherence and uses terminology appropriate to the child's age;

(K) Whether the statement is

spontaneous or directly responsive to questions;

(L) Whether the statement was elicited by leading questions; and

(M) Whether extrinsic evidence exists to show the accused's opportunity to commit the act to which the child's statement refers.

Pennsylvania - Title 42. Pennsylvania Consolidated Statutes

§ 5985.1. Admissibility of Certain Statements.

(A) General Rule.--An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing indecent contact, sexual intercourse or deviate sexual intercourse performed with or on the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal proceeding if:

(1) The court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability.

(2) The child either:

(I) Testifies at the proceeding; or

(II) Is unavailable as a witness and there is corroborative evidence of the act.

(B) Notice Required -- A statement otherwise admissible under subsection (A) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

South Dakota - Rule of Evidence

§ 19-16-38. Statement of sex crime victim under age ten. A statement made by a child under the age of ten describing any act of sexual contact or rape performed with or on the child by the defendant, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant in the courts of this state if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is available as a witness.

However, if the child is unavailable as a witness, such statement may be

admitted only if there is corroborative evidence of the act.

No statement may be admitted under this section unless the proponent of the statement makes known his intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

Texas - Code of Criminal Procedure

Art. 38.072. Hearsay statement of child abuse victim. Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child 12 years of age or younger.

(1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);

(2) Section 25.02 (Incest);

(3) Section 25.06 (Solicitation of a Child, added by Chapter 413, Acts of the 65th Legislature, Regular Session, 1977); or

(4) Section 43.25 (Sexual Performance by a Child).

Section 2. (a) This article applies only to statements that describe the alleged offense that:

(1) were made by the child against whom the offense was allegedly committed; and

(2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense.

(b) A statement that meets the requirements of Subsection (a) of this

article is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement;

(2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Added by Acts 1985, 69th Leg., ch 590 § 1, eff. Sept. 1, 1985.

Utah - Criminal Code

§ 76-5-409. Corroboration of admission by child's statement. (1) Notwithstanding any provision of law requiring corroboration of admissions or confessions, and notwithstanding any prohibition of hearsay evidence, a child's statement indicating in any manner the occurrence of the sexual offense involving the child is sufficient corroboration of the admission or the confession regardless of whether or not the child is available to testify regarding the offense.

(2) A child, for purposes of Section (1), is a person under the age of 14.

§ 76-5-410. Child victim of sexual abuse as competent witness. A child victim of

sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony.

§ 76-5-411. Admissibility of out of court statement of child victim of sexual abuse [Effective until July 1, 1990]. (1) Notwithstanding any rule of evidence, a child victim's out of court statement regarding sexual abuse of that child is admissible as evidence though it does not qualify under an existing hearsay exception, if:

(a) the child is available to testify in court or as provided by Subsection 77-35-15.5(2) or (3)

(b) in the event the child is not available to testify in court or as provided by Subsection 77-35-15.5(2) or (3), there is other corroborative evidence of the abuse; or

(c) the statement qualifies for admission under Subsection 77-35-15.5(1).

(2) Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child.

(3) A statement admitted under this section shall be made available to the adverse party sufficiently in advance of the trial or proceeding, to provide him

with an opportunity to prepare to meet it.

(4) For purposes of this section, a child is a person under the age of 14 years.

Admissibility of out-of-court statement of child victim of sexual abuse

[Effective July 1, 1990]

(1) Notwithstanding any rule of evidence, a child victim's out-of-court statement regarding sexual abuse of that child is admissible as evidence although it does not qualify under an existing hearsay exception, if:

(a) the child is available to testify in court or under Rule 15.5(2) or (3), Utah Rules of Criminal Procedure;

(b) if the child is not available to testify in court or under Rule 15.5(2) or (3), Utah Rules of Criminal Procedure, there is other corroborative evidence of the abuse; or

(c) the statement qualifies for admission under Rule 15.5(1), Utah Rules of Criminal Procedure.

(2) Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion of the child.

(3) A statement admitted under this section shall be made available to the adverse party sufficiently in advance of the trial or proceeding, to provide him

with an opportunity to prepare to meet it.

(4) For purposes of this section, a child is a person under the age of 14 years.

Vermont - Rules of Criminal Procedure

Rule 804a Hearsay Exception; Putative Victim Age Ten or Under

(a) Statements by a person who is a child ten years of age or under at the time of trial are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a criminal case in which the child is a putative victim of sexual assault under 13 V.S.A. § 3252, aggravated sexual assault under 13 V.S.A. § 3253, lewd or lascivious conduct with a child under 13 V.S.A. § 2602 or incest under V.S.A. § 205, and the statements concern the alleged crime; or the statements are offered in a juvenile proceeding under chapter 12 of Title 33 involving a delinquent act alleged to have been committed against a child ten years of age or under, if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need of care or supervision under chapter 12 of Title 33, and the statement relates to the sexual abuse of the child;

(2) the statements were not taken in preparation for a legal proceeding and, if a criminal or delinquency proceeding has been initiated, the statements were made prior to the defendant's initial appearance before a judicial officer

under Rule 5 of the Vermont Rules of Criminal Procedure;

(3) the child is available to testify either in court or under Rule 807; and

(4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness.

(b) Upon motion of either party, the court shall require the child to testify for the state. - Added 1985, No. 82 § 2, eff. July 1, 1985; amended October 30, 1986, eff. March 1, 1987.

Rule 26 (d) Hearsay Statement of a Victim who is a Child Ten Years of Age or Under. When the state in a criminal action intends to offer hearsay statements of a victim who is a child ten years of age or under, made admissible by Rule 804a of the Vermont Rules of Evidence the state shall furnish to the defendant a written statement of the evidence it intends to offer, including the name of each witness who will testify to the statement of the victim, at least 30 days before trial. The court may allow the notice to be given at a later date, including during trial, if it determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence results has newly arisen in the case. Amended Jan. 14, 1985, eff. March 15, 1985; 1985 No. 82 § 3, eff. July 1, 1985; Dec. 8, 1988 eff. March 1, 1989.

Washington - Washington Criminal Code

§ 9A.44.120 Admissibility of child's statement-Conditions

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness:

Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. Enacted by Laws 1982, ch. 129, § 2. Amended by Laws 1985, ch. 404 § 1.

Sample Statute, American Bar Association, National Legal Resource Center for Child Advocacy and Protection Part IV. Evidentiary Issues.
4.3 Out-of-Court Statements of Sexual Abuse

A child victim's out-of-court statement of sexual abuse should be admissible into evidence where it does not qualify under an existing hearsay

exception, as long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge should determine whether the general purposes of the evidence rules and interests of justice will best be served by admission of the statement into evidence. In addition, the court should consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness in deciding whether to admit such a statement.

A statement may only be admitted under this exception if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it.

Hearsay Exception for Child Victim's Out-of-Court Statement of Abuse

(A) An out-of-court statement made by a child under [eleven] years of age at the time of the proceeding concerning an act that is a material element of the offense(s) of [sexual abuse], [physical abuse or battery], [other specified offenses] that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of sections B through F are met.

(B) An out-of-court statement may be admitted as provided in Section A if:

- (1) The child testifies at the proceeding, or testifies by means of videotaped deposition (in accordance with []) or closed-circuit television (in accordance with []), and at the time of such testimony is subject to cross-examination about the out-of-court statement; or
- (2) (a) the child is found by the court to be unavailable to testify on any of these grounds:
 - i) the child's death;
 - ii) the child's absence from the jurisdiction;
 - iii) the child's total failure of memory;
 - iv) the child's persistent refusal to testify despite judicial requests to do so;
 - v) the child's physical or mental disability;
 - vi) the existence of a privilege involving the child;
 - vii) the child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or
 - viii) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television; and
- (b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(C) A finding of unavailability under

section B(2)(a)(viii) must be supported by expert testimony.

- (D) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.
- (E) In determining whether a statement possesses particularized guarantees of trustworthiness under section B(2), the court may consider, but is not limited to, the following factors:
 - (1) the child's personal knowledge of the event;
 - (2) the age and maturity of the child;
 - (3) certainty that the statement was made, including the credibility of the person testifying about the statement;
 - (4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
 - (5) the timing of the child's statement;
 - (6) whether more than one person heard the statement;
 - (7) whether the child was suffering pain or distress when making the statement;
 - (8) the nature and duration of any alleged abuse;
 - (9) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic,

detailed account beyond the
child's knowledge and
experience;

(10) whether the statement has a
"ring of verity", has internal
consistency or coherence, and
uses terminology appropriate to
the child's age;

(11) whether the statement is
spontaneous or directly
responsive to questions;

(12) whether the statement is
suggestive due to improperly
leading questions;

(13) whether extrinsic evidence
exists to show the defendant's
opportunity to commit the act
complained of in the child's
statement.

(F) The court shall support with
findings on the record any rulings
pertaining to the child's
unavailability and the
trustworthiness of the out-of-court
statement.

(Recommendations for Improving Legal
Intervention in Intrafamily Child Sexual
Abuse Cases. National Legal Resource
Center for Child Advocacy and
Protection, Young Lawyers Division,
American Bar Association. October 1982;
5th Printing June 1987.)